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courts may wish to preserve the form of the stockholder's investment, and not just its value. If the courts do decide that *Singer* is applicable to any of these areas, its effect could be easily limited by subsequent cases similar to *Tanzer* that contour and restrictively define a previously broad holding.

The language of *Singer*, novel for a Delaware court,⁹⁰ hopefully will aid minority stockholders who do not wish to be frozen out of a merged corporation. To achieve this result, however, the courts must apply this language strictly, rather than circumventing it as the Supreme Court of Delaware appears to have done in *Tanzer*.

Henry D. Evans, Jr.

ENVIRONMENTAL LAW — JUDICIAL REVIEW UNDER NEPA

I. INTRODUCTION

Declaring a national policy to "encourage productive and enjoyable harmony between man and his environment . . . [and] promote efforts which will prevent or eliminate damage to the environment,"¹ Congress enacted the National Environmental Policy Act of 1969 (NEPA or Act).² The purpose of the Act is to require that all federal agencies include a consideration of the environmental consequences of their proposed actions in their decisionmaking processes.³

Although the reviewability of administrative action taken pursuant to NEPA has been firmly established,⁴ the circuits are divided on the standard of review to be applied by a district court in evaluating an agency's compliance with the mandates of the Act.⁵ In addition, the scope of appellate review of a district court's "findings" in an action based on NEPA varies,⁶ and apparently inconsistent standards have been adopted by the circuits.⁷

90. See text accompanying notes 32 & 38-40 *supra*.

1. National Environmental Policy Act of 1969, § 2, 42 U.S.C. § 4321 (1970 & Supp. V 1975).

2. 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975).

3. 115 CONG. REC. 40416 (1969) (remarks of Sen. Jackson). See *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 294 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973).

4. See, e.g., *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 298 n.14 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973); *National Helium Corp. v. Morton*, 455 F.2d 650, 655 n.12 (10th Cir. 1971), *citing* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

5. See notes 23-58 and accompanying text *infra*.

6. See notes 68-90 and accompanying text *infra*.

7. See, e.g., *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir.), *cert. denied*, 98 S. Ct. 1238 (1978); *Sierra Club v. Froehlike*, 534 F.2d 1289, 1300,

This note will examine the various judicial approaches to the reviewability issue, discuss the scope of appellate review of district court decisions, and analyze the practical problems which may arise from differing judicial treatment of challenges under NEPA.

II. BACKGROUND

A. *The Policy and Goals of NEPA*

Any examination of judicial review of administrative action taken pursuant to NEPA must begin with an examination of the structure and underlying policies of the Act itself. As indicated above, NEPA mandates that federal decisionmakers consider the environmental impact of their actions.⁸ Section 101⁹ establishes a national environmental policy requiring agencies to use "all practicable means, consistent with other essential considerations of national policy, to improve and coordinate federal plans, functions, programs, and resources" in order to promote the beneficial use of the environment without needless degradation and undesirable consequences.¹⁰

In section 102,¹¹ specific procedural obligations designed to implement the general environmental policy established by section 101 are imposed on all agencies of the federal government.¹² The most important of these

1303, 1305 (8th Cir. 1976); *Sierra Club v. Morton*, 510 F.2d 813, 818 (5th Cir. 1975); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248 (10th Cir. 1973).

8. See note 3 and accompanying text *supra*. See also 42 U.S.C. § 4332 (1970 & Supp. V 1975). NEPA does not require that federal agencies give greater weight to environmental concerns in their decisionmaking processes, but rather that environmental factors be considered equally with economic, social, and technical factors. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 298 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

9. 42 U.S.C. § 4331 (1970 & Supp. V 1975).

10. *Id.* Section 101(b) declares the goals of NEPA as follows:

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Id. § 4331(b).

11. 42 U.S.C. § 4332 (1970 & Supp. V 1975).

12. *Id.* This section provides in pertinent part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted

"action-forcing"¹³ provisions is section 102(2)(C),¹⁴ which compels federal agencies to "include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed [environmental impact] statement" (EIS).¹⁵ The EIS serves the dual purpose of assuring that the

and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

Id.

These procedural provisions have been interpreted as requiring a "strict standard of compliance" by federal agencies. *See, e.g.,* *Scientists' Inst. for Pub. Information, Inc. v. AEC*, 481 F.2d 1079, 1091 (D.C. Cir. 1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971). Such a construction is implicit in the requirement that agencies comply with the provisions "to the fullest extent possible." *Sierra Club v. Morton*, 510 F.2d 813, 818-19 (5th Cir. 1975); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 297 n.12 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973).

However, judicial review is based on a pragmatic standard. Courts are guided by a "rule of reason" in evaluating administrative compliance with the procedural mandates of § 102. *See, e.g.,* *Sierra Club v. Morton*, 510 F.2d at 818-19; *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 798 (D.C. Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). The "rule of reason" standard reflects judicial recognition of the "judgmental" character of some of the statutory obligations confronting the administrative decisionmaker under § 102(2)(C). *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir.), *cert. denied*, 98 S. Ct. 1238 (1978). *See* notes 43-47 and text *infra*.

13. The procedural directives of § 102 are not ends in themselves, but instead are the means by which the congressional policies outlined in § 101 may be implemented. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 294 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833 n.12 (D.C. Cir. 1972); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112 n.5, 1114 (D.C. Cir. 1971); S. REP. No. 296, 91st Cong., 1st Sess. 9, 19, 21 (1969); 40 C.F.R. § 1500.1(a) (1976).

These provisions are "designed to effect substantive changes in administrative decisionmaking." *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d at 297-98. Therefore, "purely mechanical compliance" with the requirements of § 102, without giving actual good faith consideration to adverse environmental consequences, will not satisfy NEPA. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d at 1112-13 n.5, 1117.

NEPA's procedural provisions, however, will be vigorously enforced by the courts irrespective of whether compliance with § 102 will effect substantive changes in the administrative decision to proceed with a proposed project. *See id.* at 1114-15. *See also* note 12 *supra*; note 24 and accompanying text *infra*.

14. 42 U.S.C. § 4332(2)(C) (1970 & Supp. V 1975).

15. *Id.* The EIS must include a discussion of:

(i) the environmental impact of the proposed action,

federal decisionmaker has access to all relevant information on the harmful environmental consequences of the proposed action,¹⁶ and of alerting Congress and the public to the adverse impact of and available alternatives to the project.¹⁷ In summary, the EIS serves to "implement a comprehensive approach to environmental management, and [represents] a determination to face problems of pollution 'while they are still of manageable proportions and while alternative solutions are still available.'"¹⁸

B. Agency Action Reviewable

In order to ensure compliance with the procedural mandates of NEPA and to implement the environmental policies established by the Act, it was necessary that an independent reviewing body evaluate administrative compliance with the congressional objectives.¹⁹ This became the responsibility of the federal judiciary.²⁰ While agency action challenged as violative of NEPA's statutory requirements is subject to judicial review,²¹ the courts

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and,

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

16. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 295 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112 n.5, 1114 (D.C. Cir. 1971); S. REP. No. 296, 91st Cong., 1st Sess. 9, 19, 21 (1969). *See also McGarity, The Courts, the Agencies, and NEPA Threshold Issues*, 55 *Tex. L. Rev.* 801, 804 (1977).

17. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972). *See McGarity, supra* note 16, at 804-06.

18. *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972), *citing* S. REP. No. 296, 91st Cong., 1st Sess. 5 (1969). The EIS must be prepared and considered *before* a final agency decision on a proposed project, and cannot serve as an *ex post facto* rationalization of the project. *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975). *See also Kleppe v. Sierra Club*, 427 U.S. 390, 414-23 (1976) (Marshall, J., concurring and dissenting).

19. Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 *U. PA. L. Rev.* 509, 515-18 (1974). For a discussion of the congressional objectives as embodied in the statutory language, *see* notes 8-15 and accompanying text *supra*.

20. Leventhal, *supra* note 19, at 515-18. Other possible forums for review included Congress, an independent federal superagency, and the executive branch. *Id.*

21. *See* note 4 and accompanying text *supra*. It should be noted that NEPA neither expressly grants nor precludes judicial review. However, the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1976), has been held to create a presumption of reviewability of agency action. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). As a result, courts look to the APA as a basis for reviewing agency action. *See, e.g., Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 298-99 n.14 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973); *National Helium Corp. v. Morton*, 455 F.2d 650, 654-55 & n.12 (10th Cir. 1971). The courts have refused to hold that under NEPA "agency action is committed to agency discretion by law" within the meaning of § 10 of the APA, 5 U.S.C. § 701(a)(2) (1976). *Environmental*

have not applied uniform standards of review to NEPA actions.²² Judicial review is relevant in three contexts — threshold determinations, adequacy of the EIS, and the substantive merits of an agency's decision.

1. *Threshold Determinations*

The procedural directives of section 102(2)(C), the EIS provision, only apply to "major Federal actions" which have a "significant" environmental impact.²³ As a result, an agency which determines that a proposed project is not a "major Federal action," or will only have minor environmental consequences, will not be required to prepare an EIS.²⁴

It has been suggested that section 102 contains two distinct thresholds.²⁵ The first — "major Federal actions" — focuses on the magnitude of the project, while the second — "significantly affecting the quality of the human environment" — focuses on the environmental effects of the action.²⁶ In contrast, the Eighth Circuit does not bifurcate the governmental action and its environmental impact, and holds that if a project significantly affects the environment, it will be a major federal action.²⁷

The standard of review employed in evaluating such "threshold determinations" by the agency is often a consequence of the characterization of the issues by the district court.²⁸ Under the Administrative Procedure Act (APA), factual and policy determinations by an agency are to be given considerable deference by the reviewing court, while constitutional and

Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 298-99 n.14 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973). For a discussion of the necessity of judicial review of agency action under NEPA, *see generally* Leventhal, *supra* note 19, at 515-21.

22. *See, e.g.*, County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir.), *cert. denied*, 98 S. Ct. 1238 (1978) ("rule of reason" standard applied in challenge to adequacy of EIS); Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974) (procedural standard of review derived from APA applied in challenge to adequacy of EIS); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1249 (10th Cir. 1973) (reasonableness standard of judicial review applied to administrative decision whether to prepare an EIS); Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir.), *cert. denied*, 412 U.S. 908 (1973) (threshold determination whether to file an EIS involves distinct questions of law and fact which are subject to different standards of judicial review); Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366 (E.D.N.C. 1972) (threshold determination involves statutory interpretations subject to de novo judicial review). For an excellent summary of the scope of judicial review in NEPA actions, *see* Comment, *NEPA Threshold Determinations: A Framework of Analysis*, 31 U. MIAMI L. REV. 71, 78-87 (1976).

23. 42 U.S.C. § 4332(2)(C) (1970 & Supp. V 1975). *See* note 15 and accompanying text *supra*.

24. 42 U.S.C. § 4332(2)(C) (1970 & Supp. V 1975). However, the federal agency must still comply with the other procedural requirements of § 102. *Id.* §§ 4332(2)(A), (B), (E). *See* notes 11-13 and accompanying text *supra*.

25. Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir.), *cert. denied*, 412 U.S. 908 (1973). *See also* McGarity, *supra* note 16, at 841.

26. Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir.), *cert. denied*, 412 U.S. 908 (1973). *See also* McGarity, *supra* note 16, at 841.

27. *See, e.g.*, Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1321-22 (8th Cir. 1974); Patterson v. Exxon, 415 F. Supp. 1276, 1281 (D. Neb. 1976). *See also* Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 789 (D. Me. 1972).

28. Comment, *supra* note 22, at 78-80, 82. *See generally* K. DAVIS, 4 ADMINISTRATIVE LAW TREATISE § 29.01, at 114-18 (1958).

statutory questions are subject to de novo review.²⁹ Thus, in *Hanly v. Kleindienst*,³⁰ the meaning of the term "significantly" was isolated as a question of law appropriate for statutory interpretation by the court,³¹ while the appraisal of the adverse environmental consequences of the project was viewed as a fact-sensitive inquiry by the agency which should not be overturned unless manifestly "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³²

Most courts, however, realizing that deference to an agency decision not to file an EIS at a threshold stage may frustrate the policies of NEPA, have employed a "reasonableness" standard of review.³³ Under this standard, there is a searching inquiry and examination of the agency's justification for its decision.³⁴ In *Save Our Ten Acres v. Kreger*,³⁵ the Fifth Circuit noted that the challenging party must first raise "substantial environmental issues" concerning a proposed project.³⁶ The reviewing court then examines and weighs the evidence contained in the administrative record, supplementary affidavits, and other information bearing on the potential environmen-

29. *Hanly v. Kleindienst*, 471 F.2d 823, 828-29 (2d Cir.), cert. denied, 412 U.S. 908 (1973). See generally *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-17 (1971); 5 U.S.C. §§ 706 preamble, (2)(A)-(C) (1976). See also K. DAVIS, *supra* note 28, at 114-18; Comment, *supra* note 22, at 78-80, 82.

30. 471 F.2d 823 (2d Cir.), cert. denied, 412 U.S. 908 (1973).

31. 471 F.2d at 828.

32. *Id.* at 828-30, citing 5 U.S.C. § 706(2)(A) (1976). See also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Under the "arbitrary and capricious" standard, the court may not "substitute its judgment for that of the agency." *Id.* at 416.

The *Hanly* court also recognized the applicability of the "rational basis" test, first announced by the Supreme Court in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), for mixed questions of law and fact. 471 F.2d at 829. The Second Circuit indicated that this standard of review is appropriate when it would be impossible or inadvisable for a reviewing court to separate questions of law from questions of fact. *Id.* Such a situation may arise when judicial interpretation of statutory language requires some resolution of factual issues, or when de novo analysis of legal questions may ignore the expertise of the agency in assessing its statutory obligations. *Id.* In these cases, a "simpler, more practical standard, the 'rational basis' test," is appropriate. *Id.* Under the "rational basis" standard, a reviewing court cannot overturn an agency's decision if it has "warrant in the record" and a reasonable basis in law." *NLRB v. Hearst Publications, Inc.*, 322 U.S. at 131. This standard, arguably the same in application as the arbitrary and capricious standard, has been applied by some courts in review of NEPA threshold determinations. See, e.g., *Rhode Island Comm. on Energy v. GSA*, 397 F. Supp. 41, 55-56 (D.R.I. 1975); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 789 (D. Me. 1972). For a discussion of the different approaches to the law-fact distinction, see K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 30.00, at 688-93 (Supp. 1976).

33. See, e.g., *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1319-20 (8th Cir. 1974) (reasonableness standard applied); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973) (reasonableness, not arbitrary and capricious standard, applied to threshold determinations); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465-66 (5th Cir. 1973) (reasonableness standard less restrictive on court than arbitrary and capricious standard).

34. See, e.g., *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248-49 (10th Cir. 1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973).

35. 472 F.2d 463 (5th Cir. 1973).

36. *Id.* at 467.

tal impact of the proposal.³⁷ If the court finds that the agency was unreasonable in its determination that the effects of the project would not significantly degrade the environment, an EIS must be prepared.³⁸ According to the Fifth Circuit, a standard of "unreasonableness" is less restrictive on the trial court than the "arbitrary, capricious or abuse of discretion" test.³⁹

A reviewing court occasionally concludes that an assessment of the environmental consequences of a proposed action is a legal determination involving statutory construction of the term "significantly affecting the quality of the human environment," and is subject to de novo judicial review.⁴⁰ Such holdings, however, are clearly a minority view.

2. Adequacy of EIS

Once it is determined that a proposed project is a "major Federal action" which will "significantly" affect the environment,⁴¹ the question arises as to the sufficiency of the EIS prepared by the agency. As NEPA provides no standard of review for compliance with the procedural directives of section 102(2)(C),⁴² the courts have been required to devise their own judicial formulations.

In assessing the adequacy of an EIS, the purposes for requiring the statement serve as a guide for the court's decision.⁴³ If the EIS has been prepared with objective good faith and contains sufficient information to enable the decisionmaker to fully consider and balance environmental factors, it will be upheld.⁴⁴ Judicial review, therefore, often consists of an examination of *whether* the procedural requirements of section 102(2)(C)

37. *Id.*

38. *Id.* at 466-67.

39. *Id.*

40. *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356, 366 (E.D.N.C. 1972), *citing* *Scherr v. Volpe*, 336 F. Supp. 886, 888 (W.D. Wis. 1971), *aff'd*, 466 F.2d 1027, 1033 (7th Cir. 1972).

41. See text accompanying notes 23 & 24 *supra*.

42. See 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975); Note, *Program Environmental Impact Statements; Review and Remedies*, 75 MICH. L. REV. 107, 123 (1976).

43. See, e.g., *Sierra Club v. Froehlke*, 534 F.2d 1289, 1299 (8th Cir. 1976); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1971).

44. See, e.g., *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir.), *cert. denied*, 98 S. Ct. 1238 (1978); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1300 (8th Cir. 1976), *quoting* *Sierra Club v. Morton*, 510 F.2d 813, 818-19 (5th Cir. 1975); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 93 n.12 (2d Cir. 1975); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834, 837 (D.C. Cir. 1971).

In *Sierra Club v. Morton*, various environmental organizations sought to enjoin the sale of oil and gas leases in the Gulf of Mexico by the Secretary of the Interior. 510 F.2d at 817. Although the court found the EIS "research" inadequate or nonexistent in some specific areas, the statement was upheld. *Id.* at 821. The Fifth Circuit concluded: "[T]he significant environmental effects were recognized and presented in the final statement in a way which afforded the decisionmaker an opportunity to properly weigh them. NEPA's procedural requirements do not exist to dictate form but to insure that judgments are no longer based on old values." *Id.* See Note, *supra* note 42, at 124-25.

have been discussed by the agency, and the *extent* of the discussion.⁴⁵ This "rule of reason"⁴⁶ approach, which has been employed by most courts, has resulted in considerable deference to the agency's findings and conclusions.⁴⁷

For example, NEPA mandates, *inter alia*, that an EIS contain a detailed discussion of the "alternatives to the proposed [federal] action."⁴⁸ The agency must evaluate alternative courses of action that would achieve the overall objectives of the proposed project, and assess their environmental impact.⁴⁹ While the agency may be required to make informed predictions as to future technological developments, a detailed discussion of remote or speculative alternatives is not required.⁵⁰ When a claim is made that an EIS fails to consider a viable alternative, or inadequately discusses those alternatives considered, the "rule of reason" test requires that the reviewing court evaluate the reasonableness of the administrator's action.⁵¹ However, the agency's justification for the summary treatment of an alternative in an EIS, or for its exclusion therefrom, need only be rationally based to withstand judicial review.⁵²

Some courts have articulated a "different" standard of review for evaluating the adequacy of an EIS. Under their approach, a reviewing court

45. See Note, *supra* note 42, at 124-25. See generally *Sierra Club v. Froehlke*, 534 F.2d 1289, 1299-1300 (8th Cir. 1976); *National Helium Corp. v. Morton*, 486 F.2d 995, 1003-04 (10th Cir.), *cert. denied*, 416 U.S. 993 (1974); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 294-95 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973).

46. See, e.g., *Sierra Club v. Froehlke*, 534 F.2d 1289, 1300 (8th Cir. 1976); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 93 n.12 (2d Cir. 1975); *Sierra Club v. Morton*, 510 F.2d 813, 818-19 (5th Cir. 1975).

47. See, e.g., *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir.), *cert. denied*, 98 S. Ct. 1238 (1978); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1300 (8th Cir. 1976); *National Helium Corp. v. Morton*, 486 F.2d 995, 1006 (10th Cir.) (Breitenstein, J., concurring), *cert. denied*, 416 U.S. 993 (1974).

48. 42 U.S.C. § 4332(2)(C)(iii) (1970 & Supp. V 1975).

49. *Sierra Club v. Morton*, 510 F.2d 813, 825 (5th Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285-86 (9th Cir. 1974); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834-36 (D.C. Cir. 1972); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). The courts have stated that only those "reasonably available" alternatives need be discussed. See, e.g., *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 294-97 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834, 837 (D.C. Cir. 1972).

50. See *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 294-97 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834, 837 (D.C. Cir. 1972).

51. *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 93 n.12 (2d Cir. 1975); *Sierra Club v. Morton*, 510 F.2d 813, 818-19 (5th Cir. 1975); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834, 837-38 (D.C. Cir. 1972). See notes 107-09 and accompanying text *infra*.

52. See *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834, 837-38 (D.C. Cir. 1972). See generally *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285-86 (9th Cir. 1974). For a discussion of the method of analysis employed by courts in reviewing the propriety of administrative action in other areas of environmental legislation, see *Ethyl Corp. v. EPA*, 541 F.2d 1, 33-36 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

should reject an EIS if its failure to consider environmental factors or alternatives, or its treatment of relevant factors, was "arbitrary, capricious, or an abuse of discretion."⁵³

The Ninth Circuit has openly rejected the "arbitrary and capricious" test and applied what is essentially a "rule of reason" standard of review derived from the APA.⁵⁴ Section 706 of the APA requires that a reviewing court set aside agency action found to be taken "without observance of procedure required by law."⁵⁵ The analytical basis employed in reviewing the adequacy of an EIS under this standard also focuses upon the purposes underlying the EIS requirement.⁵⁶ The "form, content, and preparation" of the EIS must provide the decisionmaker with sufficient environmental information to enable him to make an informed decision whether to proceed with the proposed project.⁵⁷ Moreover, procedures must be employed which assure that Congress and the general public are afforded an opportunity to review information concerning the environmental consequences of the proposal.⁵⁸

3. Substantive Decision

Having complied with the procedural mandates of section 102⁵⁹ and prepared a detailed EIS,⁶⁰ the question arises as to the reviewability of the

53. *Chelsea Neighborhood Ass'ns v. United States Postal Serv.*, 516 F.2d 378, 387 n.23 (2d Cir. 1975); *Environmental Defense Fund, Inc. v. Armstrong*, 487 F.2d 814, 817 (9th Cir.), *cert. denied*, 416 U.S. 974 (1974), *citing* 5 U.S.C. § 706(2)(A) (1976). *But see* *National Helium Corp. v. Morton*, 486 F.2d 995, 1001-02 (10th Cir.), *cert. denied*, 416 U.S. 993 (1974). In *National Helium*, the Tenth Circuit rejected the "arbitrary and capricious" test, and applied the "rule of reason" standard. 486 F.2d at 1001-02. The court concluded that judicial review of the factual sufficiency of an EIS did not involve review of "agency action" within the meaning of the APA, 5 U.S.C. § 706 (1976), which is the statutory source of the "arbitrary and capricious" standard. 486 F.2d at 1001. However, the court never clearly indicated how the two standards differ in application.

54. *See, e.g.*, *Cady v. Morton*, 527 F.2d 786, 793 (9th Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282-83 (9th Cir. 1974).

55. 5 U.S.C. § 706(2)(D) (1976).

56. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). *See* notes 43-45 *supra*. For a discussion of the purposes underlying the EIS requirement, *see* notes 16-18 and accompanying text *supra*.

57. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).

58. *Id.* at 1283. However, the *Trout Unlimited* court noted that the "without observance of procedure required by law" standard was itself an inadequate guide for judicial review. *Id.* at 1282-83. The Ninth Circuit observed:

[This] standard, however, is less helpful in reviewing the sufficiency of an EIS than one might wish. Its difficulty lies in the fact that the "procedure required by law" by which the sufficiency of the EIS is measured consists substantially of *judicial responses* to specific allegations of insufficiency directed at specific impact statements prepared in connection with particular projects. . . . In due course the presence of a large volume of case law . . . will yield reasonably precise "procedural rules" by which the adequacy of an EIS can be measured. That time, however, has not arrived.

Id. at 1282-83 (emphasis added). *See* *Cady v. Morton*, 57 F.2d 786, 793-94 (9th Cir. 1975) (application of APA § 706(2)(D) procedural standard by reviewing court is "ad hoc" in character).

59. *See* note 12 and accompanying text *supra*.

60. *See* note 15 and accompanying text *supra*.

agency's substantive decision to proceed with the proposed project in the face of significant adverse environmental consequences.⁶¹ While most circuits have recognized that NEPA creates substantive rights and obligations which are judicially enforceable,⁶² the standard of review is a very narrow one.⁶³ Courts may reject a substantive decision by an agency only if it was reached procedurally without actual good faith consideration of environmental factors,⁶⁴ or if "the actual balance of costs and benefits that was struck . . . clearly gave insufficient weight to environmental value[s]."⁶⁵ Moreover, a court is not empowered to substitute its judgment or discretion for that of the administrator.⁶⁶ Courts, therefore, have uniformly applied the deferential "arbitrary, capricious, or abuse of discretion" standard while reviewing an agency's substantive decision to proceed with a proposed project.⁶⁷

61. For a general discussion of the reviewability of agency action under NEPA, see note 21 *supra*.

62. See, e.g., *Sierra Club v. Froehlke*, 534 F.2d 1289, 1304-05 (8th Cir. 1976); *Sierra Club v. Morton*, 510 F.2d 813, 829 (5th Cir. 1975); *Sierra Club v. Froehlke*, 486 F.2d 946, 953 (7th Cir. 1973); *Conservation Council of N.C. v. Froehlke*, 473 F.2d 664, 664-65 (4th Cir. 1973); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1279-81 (9th Cir. 1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). But see *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971).

Circuits which find substantive obligations conclude that NEPA is more than an environmental full disclosure law. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 297-99 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973). These courts maintain that agencies are required to give effect to the environmental goals of NEPA, "not just to file detailed impact studies which will fill governmental archives." 470 F.2d at 298. See also *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112-19 & n.5, 7 (D.C. Cir. 1971).

Courts have found statutory authorization for imposing substantive obligations on the agencies in the broad national policies established in § 101 and the "action-forcing" procedural provisions of § 102, 42 U.S.C. §§ 4331-4332 (1970 & Supp. V 1975). *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 297-99 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112-13 & n.5, 7 (D.C. Cir. 1971). See note 13 *supra*. See also Note, *supra* note 42, at 126.

63. See, e.g., *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 300 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973), quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

64. *Sierra Club v. Morton*, 510 F.2d 813, 829 (5th Cir. 1975). It has been suggested that the Tenth Circuit denies substantive review of an agency decision to proceed with a proposed project. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 299 n.15 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973), citing *National Helium Corp. v. Morton*, 455 F.2d 650, 655-56 (10th Cir. 1971). See note 62 and accompanying text *supra*. According to one commentator, under the Tenth Circuit's interpretation of NEPA, an agency need only be afforded an opportunity to consider environmental factors, not actually balance environmental concerns with economic, social, and technical values. 38 Mo. L. Rev. 658, 662-63 (1973) (emphasis in original). Under this rationale, a detailed EIS need only be available for consideration. *Id.* at 662-63, citing *National Helium Corp. v. Morton*, 455 F.2d 650, 655-56 (10th Cir. 1971).

65. *Sierra Club v. Morton*, 510 F.2d 813, 829 (5th Cir. 1975), quoting *Sierra Club v. Froehlke*, 486 F.2d 946, 952 (7th Cir. 1973).

66. See, e.g., *Sierra Club v. Morton*, 510 F.2d 813, 829 (5th Cir. 1975); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

67. See, e.g., *Sierra Club v. Froehlke*, 534 F.2d 1289, 1304-05 (8th Cir. 1976); *Sierra Club v. Morton*, 510 F.2d 813, 829 (5th Cir. 1975); *Conservation Council of N.C. v.*

C. Appellate Review of District Court Decisions

Following a decision in the federal district court as to whether or not agency action violates NEPA's procedural or substantive requirements, the issue arises as to the permissible scope of appellate review of the trial court's findings and conclusions. Under Rule 52(a) of the Federal Rules of Civil Procedure,⁶⁸ disputed issues of evidentiary fact determined by the trial court shall not be set aside unless "clearly erroneous."⁶⁹ The Second Circuit has stated that a fact-sensitive inquiry uniquely adapted to the trial process, such as demeanor testimony and other testimonial evidence, will only be overturned in exceptional circumstances.⁷⁰ However, documentary evidence and legal conclusions, which the appellate court may evaluate as accurately as the district court, will be subject to more intense scrutiny and justification, and may be subject to a de novo standard of appellate review.⁷¹

Courts have reacted to these basic principles of appellate procedure by explicitly or implicitly characterizing the issues on review as "factual" or "legal," and then applying the appropriate standard of review.⁷² In *Natural*

Froehlke, 473 F.2d 664, 665 (4th Cir. 1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

68. FED. R. CIV. P. 52(a).

69. *Id.* However, this standard of review has been interpreted as being less deferential to the trial judge than may first appear. According to Judge Wright: "[U]nder 'clearly erroneous' review a court may substitute its judgment for that of the trial court and upset findings that are not unreasonable." *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-35 n.74 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976), *citing* 4 K. DAVIS, *supra* note 28, § 29.02, at 118-26 (1958).

70. *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir.), *cert. denied*, 98 S. Ct. 1238 (1978), *citing* *Davis v. Schwartz*, 155 U.S. 631, 636 (1895).

71. *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir.), *cert. denied*, 98 S. Ct. 1238 (1978).

72. *See, e.g., County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir.), *cert. denied*, 98 S.Ct. 1238 (1978) (review of adequacy of EIS based on undisputed fact is "exercise in judgment" by trial court, not a finding of fact); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 85 n.7 (2d Cir. 1975) (adequacy of EIS involves legal conclusion, not fact finding subject to "clearly erroneous" rule). *But see* *Sierra Club v. Froehlke*, 534 F.2d 1289, 1300, 1303, 1305 (8th Cir. 1976), ("clearly erroneous" test applied); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 95 n.1 (2d Cir. 1975) (Mulligan, J., dissenting) (adequacy of EIS rests upon question of fact, not law); *Sierra Club v. Morton*, 510 F.2d 813, 818 (5th Cir. 1975) (when legal premises are correct, district judge's determination that EIS was adequate will only be overturned if "clearly erroneous"). *But c.f.* *Environmental Defense Fund, Inc. v. Armstrong*, 487 F.2d 814, 817 (9th Cir.), *cert. denied*, 416 U.S. 974 (1974) (scope of appellate review of district court's findings confused with standard of trial court review of administrative action; "arbitrary and capricious" standard applied).

In *County of Suffolk*, the Second Circuit concluded that disputed issues of evidentiary fact determined by the district judge were subject to the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure, FED. R. CIV. P. 52(a). *County of Suffolk v. Secretary of Interior*, 562 F.2d at 1375. However, the court stated that when the facts are undisputed, it is the responsibility of the circuit court to insure that the district judge properly applied the deferential "rule of reason" in evaluating the adequacy of an EIS. *Id.* The Second Circuit suggested that in such a case, the appellate court need not defer to the conclusions of the trial court. *Id.* *See also* *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248 (10th Cir. 1973) (judicial review of threshold determination involves legal conclusion, not fact

Resources Defense Council, Inc. v. Callaway,⁷³ various citizen and environmental groups challenged the dumping of highly polluted dredge material at a site in Long Island Sound.⁷⁴ The plaintiffs claimed that the EIS had failed to discuss the cumulative impact of area-wide dumping at the site in question,⁷⁵ and had not presented a thorough and comprehensible discussion of alternative dump sites.⁷⁶ The plaintiffs also contended that there was insufficient evidence to support the conclusion that the selected site was the most environmentally safe.⁷⁷ In denying the plaintiff's prayer for injunctive relief,⁷⁸ the district court held that the EIS complied with the requirements of NEPA, and that the substantive decision to proceed with the project was not an abuse of discretion by the agency.⁷⁹ The trial court applied the "rule of reason" standard of review,⁸⁰ and concluded that the EIS contained a sufficient discussion of alternatives to allow the decision-maker to fully consider the environmental consequences of the proposed project and alternative courses of action.⁸¹ In addition, the court determined that the lack of present scientific knowledge as to certain environmental characteristics of the dump area did not render the ultimate site selection "arbitrary or capricious."⁸²

On appeal, the Second Circuit reversed the decision of the district court, and held that the EIS was fatally deficient in its discussion of the relative merits of alternative dump sites.⁸³ In substituting its judgment for the findings of the district court,⁸⁴ the court of appeals noted that the scope of appellate review in cases involving a challenge to the adequacy of an EIS was not limited to the "clearly erroneous" rule.⁸⁵ Rather, the Second Circuit stated that the application of the "rule of reason" by the district court involved the drawing of legal conclusions and inferences from undisputed facts, which the appellate court may evaluate as accurately as the trial judge.⁸⁶

finding subject to "clearly erroneous" rule); *Hanly v. Kleindienst*, 471 F.2d 823, 828 (2d Cir.), *cert. denied*, 412 U.S. 908 (1973) (isolate questions of law from questions of fact in threshold determinations).

73. 524 F.2d 79 (2d Cir. 1975).

74. *Id.* at 81.

75. *Id.* at 82.

76. *Id.*

77. *Id.*

78. *Natural Resources Defense Council, Inc. v. Callaway*, 389 F. Supp. 1263, 1288 (D. Conn. 1974).

79. *Id.* at 1283-92.

80. *Id.* at 1282.

81. *Id.* at 1281-88.

82. *Id.* at 1291-92.

83. *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 83, 92-94 (2d Cir. 1975).

84. *Id.* at 85 n.7, 92-95 & nn.12-14.

85. *Id.* at 85 n.7.

86. *Id.*, *citing* *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248 (10th Cir. 1973).

In a dissenting opinion, Circuit Judge Mulligan rejected the majority's characterization of the assessment of the adequacy of an EIS as a legal conclusion.⁸⁷ The dissent noted that when an alleged deficiency in an EIS is its failure to consider alternative solutions, their physical viability becomes crucial.⁸⁸ According to Judge Mulligan, such an inquiry involves fact-sensitive determinations, not legal conclusions, which should not be set aside by an appellate court unless "clearly erroneous."⁸⁹ Since the district court had received extensive expert testimony as to the feasibility of alternative solutions during the trial, the dissent maintained that the appellate court should be deferential to the findings of the trial court.⁹⁰

III. DISCUSSION

A. Scope of Judicial Review of Agency Action Under NEPA

The standards of judicial review of an agency's compliance with the mandates of NEPA vary among the circuits,⁹¹ and vary with the nature of the claim confronting the trial court.⁹² Some district courts rely on the law-fact distinction to justify the judicial standard employed in reviewing threshold determinations and the adequacy of an EIS.⁹³ However, it has been suggested that this is merely an *ex post facto* rationalization of essentially judicial policy considerations.⁹⁴ The court's decision may be influenced by the amount of discretion the district judge believes the administrator should have,⁹⁵ or by the care and expertise demonstrated by the agency in its decisionmaking processes.⁹⁶

87. 524 F.2d at 95 & n.1 (Mulligan, J., dissenting).

88. *Id.*

89. *Id.*, quoting *Sierra Club v. Morton*, 510 F.2d 813, 818 (5th Cir. 1975). In *Sierra Club*, the Fifth Circuit stated: "Having failed to convince the trial court that the EIS was inadequate, the plaintiffs must now demonstrate that the lower court's findings accepting the EIS as adequate and the decision to proceed as permissible were clearly erroneous." 510 F.2d at 818. For a discussion of *Sierra Club*, see note 44 *supra*.

90. 524 F.2d at 95 & n.1 (Mulligan, J., dissenting). For an examination of how other circuits treat the issue of the scope of appellate review of a district judge's findings in NEPA cases, see note 72 and accompanying text *supra*.

91. See notes 23-58 and accompanying text *supra*.

92. See notes 23-67 and accompanying text *supra*.

93. See, e.g., *Sierra Club v. Froehlke*, 534 F.2d 1289, 1300, 1303, 1305 (8th Cir. 1976); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 85 n.7 (2d Cir. 1975); *Hanly v. Kleindienst*, 471 F.2d 823, 828-29 (2d Cir.), *cert. denied*, 412 U.S. 908 (1973); *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972). See Comment, *supra* note 22, at 78-80, 82; notes 28-58 and accompanying text *supra*.

94. See Comment, *supra* note 22, at 90.

95. See Comment, *supra* note 22, at 91. In other areas of environmental legislation, reviewing courts have allowed the administrator greater discretion in a case which is technically complex. See *Ethyl Corp. v. EPA*, 541 F.2d 1, 66-68 (D.C. Cir.) (Bazelon, C.J., concurring), *cert. denied*, 426 U.S. 941 (1976). However, there must be an examination of even the most complex evidentiary matters to enable the court to determine whether the agency decision was rationally based. *Ethyl Corp. v. EPA*, 541 F.2d at 33-36.

96. K. DAVIS, *supra* note 32, at 652-54.

One may legitimately conclude that the various deferential standards⁹⁷ employed by the trial courts will have the same practical effect.⁹⁸ As suggested by Professor Davis:

[F]ederal judges generally understand that they may not properly substitute their judgment for administrative judgment except on questions of law on which they are the experts, but that something like reasonableness, rational basis, [or] substantial evidence . . . guides what they do on other questions. . . . [I]n most cases other factors have a much stronger influence than the words of the formula that is supposed to apply.⁹⁹

Therefore, it has been suggested that the *actual* scope of review may not change significantly with the standard articulated by the trial court,¹⁰⁰ but may be influenced by other considerations.¹⁰¹ Generally, if there is a rational justification for the administrator's finding, determination, or conclusion, it will withstand judicial review.

B. *Scope of Appellate Review of a District Court's Findings in NEPA Actions*

The standard of appellate review of a trial court's finding of EIS adequacy has also been influenced by the appellate court's explicit or implicit characterization of the issues as questions of law or questions of

97. See notes 28-39, 44-47, 53-58 & 64-67 and accompanying text *supra*. When the court substitutes its judgment for that of the administrator, it undertakes de novo review. K. DAVIS, *supra* note 28, at 114-18. This discussion is inapplicable to those courts which apply a de novo standard of review to threshold determinations. See note 40 and accompanying text *supra*.

98. See, e.g., *Sierra Club v. Froehlke*, 486 F.2d 946, 951 (7th Cir. 1973) (differences in prescribed tests and standards employed by district courts in reviewing adequacy of EIS are semantic); *McDowell v. Schlesinger*, 404 F. Supp. 221, 250 (W.D. Mo. 1975) (a negative threshold determination based on insufficient data will be both "unreasonable" and "arbitrary").

99. K. DAVIS, *supra* note 32, at 653. One "factor" which may influence the court's decision is that by relieving the agency of the obligation to file an EIS — by upholding a negative threshold determination — the agency may fail to give the serious consideration to the environmental consequences of its action which is mandated by NEPA regardless of the requirement to file an EIS. 42 U.S.C. §§ 4331-4332(2)(A), (B), (E) (1970 & Supp. V 1975). See notes 11-13 and accompanying text *supra*. Consequently, a more demanding justification for the administrative decision may be appropriate at this "threshold" stage. See text accompanying notes 33 & 34 *supra*.

100. See Leventhal, *supra* note 19, at 540; Comment, *supra* note 22, at 90-91; Note, *supra* note 42, at 123-25. See also note 98 *supra*.

As observed by Professor Davis: "Formulas about scope of review do not always control judicial action; the formulas can be bent in any direction, in accordance with what the reviewing court deems to be the needs of justice or the public welfare." 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §29.02, at 999 (1970 Supp.).

101. See Comment, *supra* note 22, at 87-90; notes 95 & 96 and accompanying text *supra*.

fact.¹⁰² When the factual situation is such that the court of appeals can evaluate the administrative record as accurately as the district court, the Second Circuit has indicated that the scope of appellate review will be broad.¹⁰³

However, it is submitted that when a fact-sensitive inquiry based on the viability of suggested alternatives and related issues confronts the trial court, the scope of appellate review should be more deferential to the findings and ultimate conclusions of the trial judge.

The courts have determined that only "reasonably available" alternatives need be discussed in an EIS.¹⁰⁴ When an administrative decision is made that an alternative is not "reasonably available," the district court must be deferential to the factual determinations and policy considerations of the agency.¹⁰⁵

In contrast, when the factual basis upon which the EIS rests is in dispute, the trial court must also fulfill its obligation to assure that the agency action is not arbitrary, an abuse of discretion, or violative of the "rule of reason."¹⁰⁶ Theoretically, the focus of the reviewing court should be on the rationality of the administrative conclusion that the suggested alternative was not "reasonably available,"¹⁰⁷ and the trial court should not

102. See, e.g., *Sierra Club v. Froehlke*, 534 F.2d 1289, 1300, 1303, 1305 (8th Cir. 1976); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 85 n.7 (2d Cir. 1975); *Sierra Club v. Morton*, 510 F.2d 813, 818 (5th Cir. 1975). See note 72 and accompanying text *supra*.

103. *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir.), *cert. denied*, 98 S. Ct. 1238 (1978). See text accompanying notes 68-71 *supra*.

Generally, judicial review of agency action should be limited to the administrative record in existence when the agency made its decision, not based upon a new one made before the trial court. *Upper W. Fork River Watershed Ass'n v. Corps of Eng'rs*, 414 F. Supp. 908, 916 (N.D. W.Va.), *aff'd*, 556 F.2d 576 (4th Cir. 1977), *quoting* *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The "record" consists of the EIS itself, and all supporting studies and technical references. *Upper W. River Watershed Ass'n v. Corps of Eng'rs*, 414 F. Supp. at 913. However, when a claim is made that the agency failed to consider available alternatives or the full environmental consequences of a proposed project, it may be necessary for the reviewing court to go beyond the administrative record "to see what the agency may have ignored." *County of Suffolk v. Secretary of Interior*, 562 F.2d at 1384. New evidence may be introduced in the district court which is probative of the sufficiency of the environmental information available to the administrator during the decisionmaking processes. *Id.* at 1384-85. See notes 105-111 and accompanying text *infra*.

104. See *Sierra Club v. Froehlke*, 534 F.2d 1289, 1295, 1299-1301 (8th Cir. 1976); *Sierra Club v. Morton*, 510 F.2d 813, 825-26 (5th Cir. 1975). See generally *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 90-95 (2d Cir. 1975); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972).

105. See notes 51 & 52 and accompanying text *supra*. For a discussion of the analytical method employed by reviewing courts in other areas of environmental legislation, see *Ethyl Corp. v. EPA*, 541 F.2d 1, 33-36 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

106. See notes 19-22 & 43-58 and accompanying text *supra*.

107. See generally *Sierra Club v. Froehlke*, 534 F.2d 1289, 1295, 1299-1301 (8th Cir. 1976); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972). See notes 48-52 and accompanying text *supra*.

undertake a de novo evaluation of the viability of the alternative.¹⁰⁸ As a practical matter, however, it does not appear that the two issues can be separated. The district court must examine and weigh the evidence supporting the feasibility of the alternative if it is to make an informed judgment as to the propriety of the agency action in question.¹⁰⁹ This examination of the evidence may include resolving disputed issues of evidentiary fact, evaluating the testimonial credibility of expert witnesses, and other fact-sensitive determinations.¹¹⁰ On occasion, new evidence is offered at trial which goes beyond the administrative record in existence when the administrative decision was made.¹¹¹ In such a case, it is submitted that the scope of appellate review of the trial judge's finding that agency action was "irrational," "arbitrary," or "unreasonable" should be narrow.

IV. CONCLUSION

Although the "costs"¹¹² of judicial review may be high, it is necessary that an independent reviewing body evaluate administrative compliance with the procedural and substantive requirements of NEPA.¹¹³ Mission bias¹¹⁴ and external pressure from regulated industries¹¹⁵ may lead an agency to circumvent or ignore the environmental considerations mandated by the Act.

Concern over the technical complexity of a case should not excuse the district court from conducting a probing inquiry into the justification for administrative decisions.¹¹⁶ Although this scrutiny of the facts is to be searching and careful, the ultimate standard of judicial review has usually been a narrow one in which due deference is given to the expertise of the

108. See *Sierra Club v. Froehlke*, 534 F.2d 1289, 1295, 1299-1301 (8th Cir. 1976); note 105 and accompanying text *supra*. See also *Ethyl Corp. v. EPA*, 541 F.2d 1, 33-37 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

109. See, e.g., *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 90-95 (2d Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285-86 (9th Cir. 1974); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833-38 (D.C. Cir. 1972). See notes 48-52 and accompanying text *supra*.

110. See *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir.), *cert. denied*, 98 S. Ct. 1238 (1978). See generally *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 95 (2d Cir. 1975) (Mulligan, J., dissenting). See note 103 *supra*.

111. *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1384-85 (2d Cir.), *cert. denied*, 98 S. Ct. 1238 (1978). See also *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285-86 (9th Cir. 1974); *Silva v. Lynn*, 482 F.2d 1282, 1283-85 (1st Cir. 1973). See note 103 *supra*.

112. The "costs" of judicial review of administrative action include litigation expenses and delays in the implementation of proposed programs. Leventhal, *supra* note 19, at 515.

113. *Id.* at 515-18. See text accompanying notes 19 & 20 *supra*.

114. See Leventhal, *supra* note 19 at 515; Comment, *supra* note 22, at 89.

115. See Comment, *supra* note 22, at 89.

116. See generally *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

agency.¹¹⁷ The court's role, although possibly subject to conscious or unconscious manipulation by semantic labeling, is critical in assuring the operation of NEPA as a meaningful tool in the making of principled choices between environmental and competing concerns.¹¹⁸

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117. See, e.g., *Sierra Club v. Froehlke*, 534 F.2d 1289, 1299-1301 (8th Cir. 1976); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 294-300 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). See notes 32, 47, 53 & 62-67 and accompanying text *supra*.

118. See text accompanying notes 91-101 *supra*. See also McGowan, Book Review, 74 COLUM. L. REV. 1015, 1021 n.14 (1974).